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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WILLIAM B. COWEN, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JACMAR FOODSERVICE DISTRIBUTION,

Respondent.

Civil No. 2:17-CV-03929

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT (29 U.S.C. Sec. 160(j))

Date: June 23, 2017

Time: 9:30 a.m.

Judge: Honorable Dolly M. Gee

Courtroom: 8C, 8th Floor, First Street Courthouse

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Petitioner filed its Petition on May 25, 2017, seeking a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act ("Act"), as amended, 29 U.S.C. Sec. 160 (j)(herein "Section 10(j)"), against Respondent pending disposition of the underlying administrative proceedings. Respondent filed its Opposition on June 2, 2017. Petitioner now files this Reply, and respectfully requests that Respondent's arguments be rejected based on the evidence before the Court and well-established legal authority.

A. Respondent's Opposition asks the Court to ignore the evidence of Respondent's scheme to defeat the Union

In its initial filing, Petitioner presented substantial evidence establishing that Respondent, immediately upon learning of union organizing, and continuing to date, has engaged in a brazen scheme to defeat the Union (Food, Industrial, & Beverage Warehouse, Drivers, and Clerical Employees, Teamsters Local 630, International Brotherhood of Teamsters), by unlawful means. The scheme is evidenced by Respondent's conduct of: identifying and "listing" Union supporters once it learned of the organizing; ordering the employees' manager to immediately start "documenting" all mistakes for purposes of issuing discipline; and criticizing Respondent's (historic) leniency.

The scheme is further evidenced by the conduct of Respondent's Labor Consultant, Transportation Manager, President, and Owner each engaging in coercive conduct pre-election (threats; promises of benefits; solicitations of grievances) directed at employees.

Following the election, in which the Union had won, Respondent continued on a course to defeat the Union, but this time away from the polls. In this regard, Respondent followed through on its implementing a stricter discipline policy and began punishing and retaliating against known Union supporters through discipline, harassment, and termination.

By its Opposition, Respondent argues that this is all just some big

misunderstanding. Respondent suggests that it harbors no animosity toward the Union organizing activity of its employees; that it did not engage in any of the multiple coercive conduct allegations; that evidence of Respondent's disciplinary past practices is not what it may seem; and that the terminations and/or harsh-level of discipline that Respondent issued to known pro-Union supporters following the election was only because these employees had suddenly become bad employees.

However, Respondent's evidence in support of its position regarding the merits of the unfair labor practice allegations consists of: self-serving denials; the ignoring of animus evidence; the ignoring of historical disciplinary practices; and its shifting defenses, evidencing pretext in disciplinary decisions. Therefore, Respondent's likelihood-of-success arguments should be rejected.

Respondent's Opposition next argues that there would be obstacles to the issuance of an injunction; that the Petitioner has not established a likelihood of irreparable harm; and that the injunction would pose a hardship on Respondent's business. For reasons discussed more specifically below, Respondent's arguments on these issues are flawed because they rely on mischaracterizations of the Petitioner's theories and/or the relief being sought, and are contrary to applicable precedent. Therefore, Respondent's equitable arguments should also be rejected.

B. Respondent's call for the Court to litigate the underlying unfair labor practice charges in this forum should be rejected

As an initial matter, a review of Respondent's Opposition reflects that Respondent largely takes issue with the Petitioner's various theories for violations, and the weight the Petitioner has placed on certain evidence. Respondent even concedes certain factual conduct, but only disagrees with the Petitioner's legal arguments or interpretations.

As to the merits of the allegations, the issue before the Court is whether Petitioner has established a likelihood of success on the merits. Petitioner need not prove, by a preponderance of the evidence, all of the allegations in order to

obtain an injunction. The full litigation of this matter will take place during the underlying administrative proceedings, during which proceeding an administrative law judge will, among other things, be making credibility resolutions and ultimately ruling on Petitioner's legal theories.

To the extent that Respondent is calling for the Court to litigate this matter, that argument should be rejected. See also similar arguments set forth in Pet. Points & Authorities in Support Petition, pp. 13-14.

Notwithstanding the above, and because Respondent raises various arguments in its Opposition bearing on the merits of the allegations, Petitioner responds as follows.

C. Respondent's arguments about the March 2016 letter are irrelevant

In its Opposition, Respondent takes issue with the Petitioner's reference to Respondent having sent a March 22, 2016 letter to its employees confirming Respondent's awareness of the organizing drive, without attaching a copy of the letter. However, the relevance of the undisputed letter is merely to show the date it was sent, i.e. to further confirm Respondent's *knowledge* of the Union organizing drive as of that time. Thus, inclusion of the letter was unnecessary.

D. Respondent's blanket denial of the 8(a)(1) coercive-conduct allegations consists of self-serving denials, and ignores Petitioner's corroborating evidence of Respondent's animus

In its Opposition, Respondent argues that its Labor Consultant (Carlos Flores), President (Randy Moore), Transportation Manager (Arturo Nila), and Owner (James Dal Pozzo) did not engage in various coercive conduct pre-election (e.g. threats of reprisal; solicitations of grievances; promises of benefits). However, Respondent relies solely on the self-serving testimony of its agents on the issue, and their blanket denials.

As noted above, the administrative law judge will be making credibility resolutions during the underlying proceedings. That being said, the Petitioner

submits that the evidence it presented in support of these allegations, the testimony of Respondent's employees, about what was said is persuasive.

First, the existence of multiple allegations, involving multiple Respondent agents, each of which share a common thread (coercing employees into voting against the Union) renders each of the allegations consistent and therefore reliable when viewed in their totality.

Second, the employees' versions of what was said to them are consistent with how off-the-cuff conversations go, as opposed to Respondent's version of the events, which read more like scripts.

Next, the Petitioner, in support of the allegations, has submitted to the Court additional evidence of animus, including what was said behind closed doors, that bolsters the employees' testimony about what Respondent said to them directly.

Notably in this regard is the testimony of former Transportation Manager Jesus Velasco regarding how Respondent reacted to the Union organizing. Velasco testified that upon learning of the Union organizing, Respondent began making lists of Union supporters; instructed him (Velasco) to start documenting mistakes for purposes of issuing discipline; questioned his past leniency with drivers; and reacted negatively when names of particular employees who supported the Union were brought to Respondent's attention. (Pet. Exh. 12, pp. 131-142).[1]

Moreover, Respondent's Labor Consultant (Carlos Garcia) revealed to Juan Galarza, whom Respondent alleges was a statutory supervisor at the time, that if the Union won the election, he would advise Respondent to deny benefits to employees. The Labor Consultant later told Galarza that he will be providing a list of Union supporters to Respondent, and that he was pretty sure Respondent would then fire those employees. (Pet. Exh. 12, pp. 89-90).

Thus, and contrary to Respondent's claim that Petitioner does not have

[1] "Pet. Exh." is a reference to the exhibits submitted in support of the original Petition.

sufficient evidence to support the 8(a)(1) allegations, Petitioner submits that the employee testimony about what was said, coupled with this additional evidence of animus corroborating Respondent's established animus, establishes that Petitioner has a strong likelihood of success on the merits of the 8(a)(1) allegations.

With regard to Respondent's additional arguments that certain of the 8(a)(1) allegations, listed below, do not appear on their face to be unlawful, Petitioner submits as follows.

1. Regarding the Labor Consultant's threat that the Union would immediately charge employees penalties if they disobeyed the Union:

The violation here is because this statement is just not true, and is coercive by its absolute falsity. The statement that the Union would (not might, will, or under certain circumstances) issue penalties between $500-$1000 dollars per instance to employees in every instance of disobedience is without objective basis and is coercive.

To the extent the Respondent, by its Opposition, wants to supplement what was said by providing a full and complete explanation of the limited circumstances in which a union-member employee may be subject to a Union fine, the argument is unavailing because this is not what was said. Rather, what the employees were told was that the Union will issue penalties to them if they ever disobey the Union. (Pet. Exh. 12, p. 121).

2. Regarding the threat that President Moore made when he brought employee Douglas Flores into his office, reminded Flores of previous discipline he had received, and then brought up the consequences of the Union:

Contrary to Respondent's contention that there was no threat, the Petitioner submits that the evidence (including Moore's testimony) about what was said during this exchange establishes that Moore implicitly, if not directly, threatened Flores that if the Union were to be voted in, changes would be made to the disciplinary policy that would be unfavorable to employees. (Pet. Exh. 12, pp.72-

73;174-175).

Flores immediately got the message because after Moore made the connection, Flores began verbally distancing himself from those employees that were supporting Union. (Pet. Exh. 12, pp. 174).

Finally, that this threat was made is further bolstered by the evidence discussed above, about Respondent's decision to start documenting every mistake the drivers made for purposes of discipline, as well as Respondent's later implementation of a stricter discipline policy (discussed more below).

E. Respondent's arguments that the timing of the wage increase during the organizing campaign was actually for reasons wholly unrelated to the Union organizing should be rejected

Respondent does not dispute that it issued a wage increase during the Union's organizing campaign. It merely takes issue with Petitioner's argument that it was motivated by employees' Union activity.

Respondent's instead argues that its motivation for the wage increase was to prevent a loss in drivers and was based on a market study it conducted; and that its timing during the organizing campaign was just a coincidence.

First, there is nothing in the record evidence before the Court to suggest that Respondent had any material concern about individual hourly wage rates, or the amount of the employees' annual increases to those rates, before it learned of the Union organizing. To the contrary, when employee Esteban Ochoa approached Respondent in early 2016 about his hourly wage rate, and how his annual increase for that year (25 cents an hour) was insufficient, Respondent simply told Ochoa about an upcoming incentive program that Respondent would be implementing in the future. (Pet. Exh. 12, pp. 118-119). Thus, prior to learning of Union organizing, Ochoa's complaint did not cause Respondent to launch a "market study," or otherwise deliberate over and rapidly implement hourly wage increases.

Second, the hurriedness of the launching, conducting, and analyzing of this

"market study" in such a short period of time (in early May 2016), along with the rushed announcement of the wage increase,[2] during a time in which Respondent had been aware of the Union organizing (since March 2016), all support the Petitioner's argument that the wage increase was motivated by and in response to the Union organizing.

F. The evidence establishes that Respondent (as it foreshadowed) implemented a more onerous discipline policy after the Union won the election

Because Respondent mischaracterizes or distorts this allegation and the Region's evidence in support, it is important to start with a reiteration of the allegation and Petitioner's argument so as to best address Respondent's arguments.

1. Respondent's change in disciplinary policy: issuing First and Final Written Warnings with attached probation periods.

As articulated in Petitioner's initial Points and Authorities, Petitioner submits that *following* the Union election, and consistent with its pre-election foreshadowing of an intent to impose stricter discipline on employees if the Union was voted in, Respondent began disciplining employees in a more stringent manner. More specifically, Respondent began issuing employees (e.g. Ochoa and Garcia) First and Final Written Warnings, with an attached probationary period, for conduct that Respondent historically handled in a more lenient or progressive manner.

2. Respondent's arguments about "progressive discipline" are semantics

Although Respondent denies that prior to the Union election, it was more lenient with discipline and/or had a progressive discipline policy in place, this

[2] Juan Galarza (who Respondent submits was a supervisor within the meaning of the Act for these very employees at the time of the wage increase) did not know anything about the wage increases until after it happened. (Pet. Exh. 12, p.88)("appeared to be an overnight decision").

assertion is contradicted by the testimony of Respondent's former Transportation Manager Jesus Velasco, and also Respondent's own disciplinary records.

More specifically, Velasco testified that historically, employees that did not follow directions or were otherwise insubordinate were either spoken to or just written up. (Pet. Exh. 12, p. 132). Velasco testified that upon learning of the Union organizing, Respondent's President complained to him (Velasco) about how he (Velasco) had been too lenient with drivers in the past; told him to document all mistakes drivers make; and that things are going to change if the Union is voted in. (Pet. Exh. 12, pp. 134-135).

Next, a review of Respondent's disciplinary records, pre-dating the Union's election, supports Velasco's testimony, and also evidences progressive levels of discipline being issued to employees. (Pet. Exh. 13, pp. 197-234). In this regard, the disciplinary records set out various stages of discipline; and the records also reflect that employees were issued levels of discipline (both for verbal and written warnings); and not just a warning, but a 1st warning, a 2nd warning, and a 3rd warning. The documents further evidence a progressive discipline policy because they: warn the employee that further violation of company policy will result in additional disciplinary action, leading up to termination; and/or inform the employee that if they do not improve, they will be subject to further discipline up to and including termination; or inform the employee by narrative that the next time this happens, it will result in termination. (Pet. Exh. 13, pp. 197-234).

In the Petitioner's view, this shows that Respondent had a policy of progressive discipline, consistent with Velasco's testimony about leniency. To the extent Respondent takes issue with the Petitioner's characterization and advances before the Court the narrowest definition of "progressive discipline" possible to try and refute that characterization, such an argument does not establish that Petitioner's view does not have reasonable basis.

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3. Respondent's disciplinary records support the change in policy

Respondent's disciplinary records (pre-dating the Union election do not show any circumstances in which an employee received a First and Final Written Warning, with an attached probationary period, for alleged infractions akin to what Ochoa (insubordination) and Garcia (Rest and Meal period violations) were (after the Union election) issued First and Final Written Warnings, with attached probation.

In fact, as Petitioner noted to the Court in its initial filing, the only evidence of Respondent ever issuing a First and Final Written Warning, with an attached probation period, pre-dating the Union organizing, is one time, to employee Douglas Flores. Flores received that level of discipline after getting into a major accident, because he had been driving at an unsafe speed, and because the accident cost the Respondent $28,000.00. (Pet. Exh. 12, p. 197).

Respondent argues that this one example, involving Flores, undercuts the Petitioner's argument of a change in policy. However, Petitioner disputes this argument. As noted above, Respondent's disciplining of Ochoa and Garcia was inconsistent with its historical practice (pre-dating the Union election), while simultaneously being consistent with Respondent's threats to impose stricter discipline if the Union wins the election. Petitioner submits that this reasonably evidences a policy change.

4. Respondent's citation to its Standard of Conduct is misguided

Respondent next argues that its written Standards of Conduct do not have a provision that specifically delineates progressive discipline. However, this argument is misguided. The Petitioner is alleging that Respondent's change in policy is based on the change in the manner in which Respondent has historically issued discipline. The policy change has to do with the stricter level of discipline issued in the form of First and Final Written Warnings, with attached probation periods.

G. The 8(a)(3) termination and discipline allegations

Before more specifically addressing Respondent's arguments as to the discipline and termination allegations, Petitioner initially submits that Respondent's Opposition fails to refute Petitioner's arguments as to what occurred. The evidence remains clear that Respondent, following the Union election, punished and retaliated against employees because they were Union supporters. Respondent seized on incidents involving the three Union-supporting employees (Juan Galarza, Esteban Ochoa, and Carlos Garcia) to discipline and terminate them in retaliation for their Union activities, and as part of their ongoing scheme to defeat the Union.

In support of its Opposition, Respondent attached as exhibits Separation Notices of 6 employees alleged to have been terminated prior to the organizing activity.[3] Three of the Notices appear to involve a different facility in northern California or in Sacramento, California (the notices for drivers issued by Supervisor Dave Eckert).[4] And some Notices involve employees that did not pass their initial probationary period. In these circumstances, the Notices would be irrelevant.

Moreover, the circumstances described in the Notices do not refute the Petitioner's assertion of an absence of a history of Respondent issuing employees First and Final Written Warnings, with attached probation periods, in the manner and for the reasons it did to Ochoa and Garcia; nor do these Notices alter a finding that Respondent's discipline and/or terminations of Galarza, Ochoa, and Garcia were retaliatory for Union activity (discussed more below).

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[3] Petitioner has conducted a good-faith search of its files and has no record of Respondent previously providing it with these Separation Notices. Nevertheless, it is acknowledged that the issue before the Court is the relevance of the Notices.

[4] https://www.linkedin.com/in/dave-eckert-a6316151 (linked in profile of Dave Eckert, Manager, Jacmar Food Distribution-*Northern CA (Sacramento)*).

H. Respondent has failed to establish that it lawfully terminated Juan Galarza

1. Respondent may not terminate a purported supervisor for Union activity the purported supervisor engaged in as an employee

With regard to Respondent's termination of Juan Galarza, Respondent initially argues that at the time Galarza was terminated, he was the Transportation Supervisor. Respondent next argues that while in this position, he was a supervisor within the meaning of Section 2(11) of the Act. Thus, Respondent posits that it could, and should be able to, fire Galarza even it was for his Union activity.

As to this initial argument, it is critical to note that Galarza, before becoming Transportation Supervisor, was an undisputed employee and protected by the Act; and that he engaged in Union activity while an employee. Upon becoming a Transportation Supervisor, Galarza ceased all Union activity. (Pet. Exh.12, p. 87). And there is also no contention by Respondent that Galarza engaged in any Union activity after becoming Transportation Supervisor.

Based on the above, it is unclear under what rationale or legal precedent Respondent is therefore arguing that it would be privileged to terminate Galarza for Union activity he lawfully engaged in as an employee, when he was protected by the Act, even assuming arguendo he was a supervisor under the Act at the time of his later termination. Such an argument by Respondent is contrary to the protections of the Act; is contrary to the Board's handling of this subject in analogous situations;[5] and would create a dangerous precedent if ever adopted.

Based on the above, and even assuming arguendo that Galarza was a

[5] The Board has held that refusing to promote an employee into a supervisory or position based on his/her union activity violates the Act. *Pacific American Shipowners Association*, 98 NLRB 582, 597 (1952), enfd. 218 F.2d 913 (9th Cir. 1955), *cert denied*, 349 U.S. 930 (1955). See also *Little Lake Industries, Inc.*, 233 NLRB 1049, 1057 (1977)(employer may not question an employee's loyalty to management based on his/her protected activity as a rank and file employee).

supervisor within the meaning of the Act at the time of his discharge, his discharge would still be unlawful.

For these reasons, it is unnecessary for the Court, and similarly it will be unnecessary for the underlying administrative law judge or Board, to resolve this purported supervisory dispute.

2. Respondent has not met its burden of establishing that Galarza was a supervisor within the meaning of the Act

Even assuming *arguendo* that Galarza's supervisory status needed to be resolved, Respondent has failed to meet its burden of proof in establishing that Galarza was a supervisor within the meaning of the Act when he was discharged.

Section 2(11) of the Act defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and (3) their authority is held "in the interest of the employer." *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *Oakwood Healthcare Inc.*, 348 NLRB 686, 688 (2006).

It is well established that the party asserting supervisory status has the burden of proving all three prongs by a preponderance of the evidence, and that a lack of evidence is construed against the party asserting supervisory status. *Kentucky River*, 532 U.S. at 711-712; *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 11 (1st Cir. 2015).

Respondent promoted Galarza to Transportation Supervisor on or about mid-to-late April 2016, after the departure of Transportation Manager Velasco. The record evidence reflects that there was no one in the Transportation Supervisor position at the time it was given to Galarza. Respondent then hired Transportation Manager Art Nila on or about May 6, 2016. Galarza maintained this position until his termination on June 3, 2016. (Pet. Exh. 12, pp. 65, 66, 74, 80, 86, 93; Resp. Exh. E, pp. 59, 60, 71). Nila admits, that to the extent Galarza performed certain duties, such as scheduling drivers; it was only during his "initial transition period." (Resp. Exh. E, p. 60; Pet. Exh. 12, p. 90).

Indeed, by the last week of May 2016, Nila was finishing up work "preparing routes for drivers the next day." (Resp. Exh. E, p. 67). On June 2, 2016, it was Nila that directed Driver Miguel Bertoglio to take over the route that would have been given to Driver David Diaz, if he had been reached. (Resp. Exh. E, p. 69). It was also Nila that commanded Galarza to take over Bertoglio's route until Diaz could be reached. (Resp. Exh. E, pp. 69-70).

To the extent that Respondent argues that Galarza assigned work, there is insufficient evidence to establish that Galarza's assignment of any particular work called for the use of independent judgment. *Stanford Hotel*, 344 NLRB 558, 563 (2005) (making routine assignments without use of independent judgment is not supervisory).

As a matter of fact, Galarza's alleged assignment of work did not extend any further than the duties he had as a dispatcher, which Respondent concedes was an employee position. (Pet. Exh. 12, p. 82 ("I still handled all of the dispatch tasks as I did before, where I called drivers and received calls from drivers assigning them to pick up certain loads." And "I also created the route schedule for each driver the day before the driver was to work, which was a task I had handled while I was a dispatcher.")).

Despite Respondent's assertion that Galarza was responsible for rewarding

drivers under the driver incentive program, Galarza merely reported the drivers that reached the pre-determined threshold established by upper management. (Pet. Exh. 12, p. 84); *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1077-79 (10th Cir. 2005) (enforcing Board decision that utility's revenue protection workers were not supervisors because they exercised virtually no independent judgment and set bonuses for employees' discovery of power diversion based on company's criteria). That is, Galarza informed President Randy Moore which drivers delivered more than 145 cases per hour in order to receive an additional cent per case, which drivers delivered more than 160 cases per hour in order to deliver an additional three cents per case, and which drivers made no mistakes while making deliveries in order to receive a $25 bonus that week. (Pet. Exh. 12, p.84). Moore then reviewed Galarza's notations and approved those that met the requirements. Moore even asked Galarza to review his calculations to assure that drivers actually met the requirements. (Pet. Ex 12, p. 84).

By its Opposition, the Respondent has failed to meet its burden of establishing that Galarza was a supervisor within the meaning of the Act at the time of his termination. Respondent's contention that he would have any supervisory indicia is – given the limited duration of this position – conjecture.

3. Respondent's purported basis for terminating Galarza is pretext

As for Respondent's remaining argument - that Galarza was terminated for not demonstrating his ability to perform duties in a supervisory role - that argument should be rejected as pretext.[6]

As set forth in its initial pleadings, Petitioner has established a prima facie case that Galarza engaged in Union activity (as driver/dispatcher); Respondent was

[6] Evidence establishing that an employer's reason for discipline is pretext (supporting a discriminatory motivation) includes: disparate treatment; shifting explanations; and failure to allow a discriminatee to respond to an allegation of misconduct. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

aware of that Union activity; Respondent had animus toward that and all Union activity; and that the termination was motivated by this Union activity.

Respondent's purported *Wright Line* defense is pretext for a variety of reasons.

First, Galarza had never before been disciplined by Respondent. At the end of his probation period as a driver/dispatcher, he was given a $2.00 per hour raise because of his good work. After he was elevated to the Transportation Supervisor, he was given a bonus check of $500 for his good work. (Pet. Exh. 12, p. 94).

Second, Respondent's witnesses' accounts of its purported reasons for terminating Galarza not only conflict with Galarza's testimony (discussed more below), the witnesses conflict with each other. Transportation Manager Nila claims that he terminated Galarza because he lied about having spoken to Driver David Diaz on June 2, 2016. (Resp. Exh. E pp. 70-71). President Randy Moore testified that Nila said that he had caught Galarza in an outright lie – Galarza claimed to have called Driver Diaz and had not done so, making it appear that Diaz was the liar. (Pet. Exh. 12, p. 74). Director of Human Resources Gonzalo Ventura, Jr., echoes Moore's testimony - Nila told Ventura that he had instructed Galarza "to call a driver and tell him to do something, and it turned out that Galarza had never called that driver." (Pet. Exh. 12 p.167) (emphasis added). Respondent's contradictory testimony (a call and a lie vs. a no-call and a lie), as well as a lack of concern for the underlying reasons under which Nila chose to terminate a recently promoted employee, demonstrates that Respondent does not have a consistent account of what transpired.

Third, at the time of his termination, the only explanation Respondent would give Galarza was that he purportedly did not communicate well with the drivers. Galarza was given no specifics, or an opportunity to address any alleged deficiencies Respondent suggests after-the-fact.

Fourth, although Respondent would not give him any specifics as to why he

was terminated, Respondent did tell Galarza that if he ever returned to the facility without an appointment, Respondent would call the police. (Petitioner Exh. 12, p. 93-94).

Fifth, the only incident that Galarza is even aware of that occurred just prior to termination involved the circumstances whether another driver had lost his phone, and confusion over whether and/or how he may have left messages with Galarza. Galarza's testimony about that event does not suggest that anything of material significance occurred, certainly nothing that would suggest he should be discharged. (Petitioner Exh. 12, pp. 92-93).

Sixth, if Respondent's only issue with Galarza (as Respondent submits) is that he was not a good fit in the Transportation Supervisor role, why didn't Respondent return him to a dispatcher and/or driver position? A position in which the Respondent declared Galarza had "perceived skill." (Pet. Exh. 12 p. 65).

Based on the above, Petitioner submits that Respondent's purported reasons for Galarza's termination are pretext. The timing and circumstances of the discharge; Respondent's awareness of Galarza's prior Union activities; and Respondent's animus toward the Union organizing, all evidence that once the election results were in, it chose to discharge Galarza in retaliation for his prior involvement in the Union organizing. The subsequent disciplining and discharging of Ochoa, and disciplining of Garcia (discussed below), further supports the conclusion the termination was part of Respondent's overall scheme.

I. Respondent's explanations for the discipline and discharge of Esteban Ochoa further support the Petitioner's allegations

In its Opposition, Respondent cites to three incidents involving employee Esteban Ochoa, and argues that Respondent's discharge of Ochoa as a result of these incidents was motivated by lawful reasons. However, Respondent's arguments are without merit and should be rejected.

As an initial matter, and with regard to the first incident (Ochoa's

conversation with Saucedo about the Union), Respondent has set forth a *Wright Line* defense (i.e. that Ochoa was not being "respectful and professional")[7] that runs afoul of the Act. Respondent has not explained why Ochoa's conversation with Saucedo (about the Union) is not protected concerted activity under the Act, or how Ochoa would have lost the protections of the Act.

Given Respondent's foundational reliance on this incident in support of the overall termination decision (discussed below), Respondent's *Wright Line* defense taints the entire termination.

Notwithstanding the above legal deficiency, Petitioner submits that Respondent's assertion that Ochoa was disciplined because it believed his behavior to have been inappropriate, is pretext.

In this regard, it is notable that Respondent did not provide Ochoa with a meaningful opportunity to even respond to the allegation. Respondent did not give Ochoa any specifics when it confronted him with the allegation. Rather, Respondent just generally accused Ochoa of aggravating or harassing employees and making them feel uncomfortable – leaving Ochoa with a lack of specifics to even address. (Pet. Exh. 12, p. 124). That Respondent did not afford Ochoa any kind of meaningful opportunity to respond reflects that Respondent was pre-determined to issue discipline, for retaliatory reasons.

Next, Ochoa was not even informed of Respondent's decision to issue him a First and Final Written Warning, with an attached probationary period, for this incident until the time he was told he had violated that probation and was being fired. (Pet. Exh. 13, p. 194).[8]

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[7] Pet. Exh. 13, p. 194.

[8] Respondent's implication that Ochoa may have engaged in other aggressive behavior with employees, aside from Saucedo, is irrelevant, as no other alleged incidents are mentioned in the termination form - only the conversation with Saucedo). (Pet. Exh. 13, p. 194).

Similarly, and with regard to the second alleged "incident" involving Ochoa, again, Respondent did not inform Ochoa that its decision was to issue him a First and Final Written Warning, with an attached probation period, until the date he was told he was terminated. (Pet. Exhibit 13, p. 194).

It is also important to note that in the Termination Form that was issued by Respondent to Ochoa, Respondent decided that the First and Final Written Warning, with attached probation period, was warranted because of both the first incident (involving Saucedo) and this second incident. As noted above, and inasmuch as the Respondent's purported concern over what said to Saucedo was both pretext (if not also an unlawful basis to discipline), the First and Final Written Warning, with attached probationary period, is additionally unlawful to the extent it was only issued because of the first incident.

Further evidencing the pretext of the First and Final Warning, with attached probationary period, is that Ochoa had worked for Respondent for 2 years without any discipline or write-ups. (Pet. Exh. 12, p. 14). Moreover, and as articulated above, Respondent's decision to issue a First and Final Written Warning, with attached probation, was an unlawful departure from how it handled similar allegations of employees refusing instructions, or insubordination, in the past. (Pet. Exh. 12, p. 132; see also Pet. Exh. 13 (discipline records), pp. 201, 208, 220, 223, 224).

As to Respondent's arguments regarding the impact of the third incident, i.e. in support of the termination decision, Respondent's shifting defense on this issue is telling.

First, Respondent's Director of Human Resources (Gonzalo Ventura) testified that Respondent did not terminate Ochoa for not having a valid medical card. Rather, it was the result of a combination of the incidents that led to the decision to terminate. (Pet. Exh. 12, p. 155). This is further confirmed on Ochoa's Termination Form, where it states that Ochoa was terminated only

because of all the cited incidents. (Pet. Exh. 12, p. 194).

By its Opposition, Respondent now argues that this third incident alone justified the termination. (See Resp. Opposition, p. 13). However, this is contradicted by Respondent's own witness and termination form, as noted above. Respondent's "shifting defense" on this subject reflects pretext.

J. Respondent's disciplining of Carlos Garcia was motivated by its animus toward his Union activity

Respondent argues that Carlos Garcia was issued a First and Final Written Warning, with attached probation, because he violated the company's rules regarding Meal and Rest periods.

Initially, it is important to note that the First and Final Written Warning, with attached probation, that Respondent issued to Carlos Garcia, was in furtherance of Respondent's unlawfully implemented stricter disciplinary policy.

There are several instances of drivers (before the Union organizing) violating Respondent's Meal and Rest period rules, none of which employees received a First and Final Written warning, with attached probationary period. (Pet. Exh. 13 (disciplinary notices), pp. 198, 199, 200, 205, 207, 209, 210, 211, 212, 213, 214, 222, 225, 226, 228, 229, 232, 233, 234).

Further reflecting pretext is that Garcia raised the issue of the missed meal period with Nila on July 7, 2016. (Pet. Exh. 13, p. 195). Nila said nothing about the issue being of any concern to Respondent at that time. (Pet. Exh. 12, p. 104). Respondent did not issue discipline to Garcia until August 1, 2016. (Pet. Exh. 13, p.195). That Respondent waited 3 weeks to issue discipline reflects that the underlying infraction was not of true concern to Respondent. Rather, Respondent only later seized on it as pretext so as to issue Garcia a First and Final Written Warning, with attached probation.

These circumstances, coupled with Respondent's awareness of Garcia's Union activities, and its animus toward the Union organizing, support the

allegation that Respondent unlawfully disciplined Garcia.

K. Respondent's lack-of-irreparable-harm arguments are unconvincing

Respondent raises various irreparable harm arguments, but these arguments either confuse the need for injunctive relief, or are refuted by precedent.

1. Respondent's argument that the Petitioner has failed to establish that absent a temporary injunction, there will be irreparable harm, should be rejected.

As noted in the initial Points & Authorities, a temporary injunction is necessary in this case to protect the status of the Union as the *potential* certified bargaining representative from irreparable injury.

A temporary injunction will preserve the Union's ability to bargain effectively. Newly certified unions are vulnerable to employer misconduct, and that illegal interference with employees' freely chosen representative warrants the protections of Section 10j.[9]

Indeed, the Union is even more vulnerable here if Respondent contests the recently issued Board Order and declines to bargain until the Order is enforced by a Federal Court of Appeals. Moreover, and in the event a rerun election is ordered, relief is needed to preserve the Union's support in the unit. Absent interim relief, the Union's ability to renew its organizing campaign will be undermined by Respondent's illegal conduct eroding its support.

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[9] In Petitioner's Points & Authorities in support of the Petition, at p. 21-22, Petitioner discussed Respondent's testing of the Union's certification. Since that filing, the Board has issued its Decision and Order in that collateral matter (Case 21-CA-193952), granting the General Counsel's Motion for Summary Judgment over Respondent's refusal to bargain. See *Jacmar Food Service Distribution*, 365 NLRB No. 91 (June 6, 2017). However, given Respondent's anticipatory contesting of the Board's decision, the Order will next need to be enforced before a Circuit Court. Thus, injunctive relief (in this matter) remains necessary.

2. Respondent incorrectly contends that the Petitioner is trying to establish irreparable harm solely by establishing a substantial likelihood of success on the merits

Respondent misstates the Petitioner's argument. Petitioner's actual argument as to this issue is set out in its Points & Authorities, at p. 21-22, where, in relevant part, Petitioner explains: "The same evidence and legal conclusions establishing a likelihood of success, together with permissible inferences regarding the likely interim and long-run impact of the likely unfair labor practices, provide support for a finding of irreparable harm."(citations omitted).

3. Respondent argues that an injunction is not necessary because it does not appear to Respondent that Galarza or Ochoa need work at this time and the backpay figures are not significant

Petitioner is not (as Respondent notes) seeking monetary relief by way of this injunction. Make-whole remedies (i.e. backpay) are liquidated and pursued during a compliance phase following a Board Order in the underlying administrative proceedings.

Petitioner is, however, seeking by way of the temporary injunction, that Respondent be ordered to offer reinstatement to the discharged employees pending resolution of the administrative processes. Although Respondent just focuses on Galarza and Ochoa's personal circumstances, an offer of interim reinstatement is being sought and is needed to prevent a chilling impact of the discharges on the remaining employees of Respondent. As time goes on and the discharged employees are absent from the facility without having been reinstated, the remaining employees will understand that Union support will likely result in their discharge and that neither the Board nor the Union can effectively or timely protect them.

Even if one or both of the discharged employees decline Respondent's offer of reinstatement, which is speculative until such time as an offer is appropriately

made, a reinstatement offer is just and proper because employees should be given the opportunity to accept such an offer under the protection of a 10(j) Order. *Gottfried v. Mayco Plastics, Inc.*, 472 F.Supp. 1161, 1166 (E.D. Mich. 1979), *aff'd. mem.*, 615 F.2d 1360 (6th Cir. 1980).

4. Respondent's arguments about delay are unpersuasive

Respondent's argument that interim relief is unwarranted because the Board purportedly delayed in filing the Petition, is unavailing. The Board needs a reasonable period of time to investigate, deliberate, and authorize the filing of a Section 10(j) action. *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000). The time taken to process the underlying charges, which includes a pattern of unlawful conduct by Respondent, and multiple charges, and to authorize filing of the Section 10(j) petition in this case, does not indicate undue delay. See *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 248-249 (3d. Cir. 1998)(14-month delay insufficient to deny relief when otherwise warranted); *Pascarelli v. Vibra Screw Inc.*, 904 F.2d 874, 881-882 (3d Cir. 1990)(need for injunctive relief emerged over time from pattern of violations); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1363-1364 (9th Cir. 2011)(rejecting delay arguments).

More importantly, courts have recognized that delay is not in itself determinative of the propriety of injunctive relief. Delay is significant only if the harm has occurred and the parties cannot be returned to the status quo, or a Board order in due course is likely to be as effective as interim relief. *Sharp*, 225 F.3d at 1135-1136.

The instant matter involves a number of related charges that took time to carefully investigate and decide. Here, injunctive relief is necessary because the parties cannot be returned to the status quo absent interim relief. Notably in this regard, Respondent's imposition of a stricter discipline policy is a tool that it has used to discriminate against Union supporters. Interim relief is necessary to cease this conduct. Moreover, and because the Union may be subjected to a re-run

election, interim relief is necessary so that the Union can maintain support until such time as there is a Board Order in this matter. The amount of time that has passed does not prevent a return to the status quo, and is necessary to prevent irreparable harm.

L. Respondent's claims of undue hardship if an injunction is ordered are not persuasive

Respondent argues that the issuance of an injunction, calling for Respondent to implement a progressive disciplinary policy that Respondent alleges it does not have, will be an undue burden.

First, Petitioner merely seeks a restoration to the status quo, i.e. that Respondent cease issuing employees First and Final Written Warnings, with attached probationary periods, for conduct it historically did not discipline at that level. Since this is a very narrow and specific remedy as the change in disciplinary policy, it should not pose any burdens.

Petitioner is not, contrary to Respondent's suggestion, seeking that the Court order Respondent to do anything new, nor is Petitioner seeking to prevent Respondent from disciplining its employees for lawful reasons.

With regard to Respondent's arguments that reinstatement of Ochoa or Galarza would create hardships, Petitioner previously addressed these arguments in its initial Points and Authorities. (Petitioner Points & Authorities in Support of Petition, pp. 23-24). Briefly summarized, Respondent has not established that it will suffer undue harm by reinstating experienced employees, who had no history of discipline prior to Respondent's unlawful disciplinary actions.

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M. Conclusion

For the above-noted reasons, Petitioner respectfully submits that the arguments in Respondent's Opposition should be rejected, and that a temporary injunction should issue.

Dated at San Diego, California, this 9th day of June, 2017.

Respectfully submitted,

/s/ Robert MacKay
Robert MacKay
Attorney for Petitioner